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No. 513

In the

Supreme Court of the United States

OCTOBER TERM, 1968

CORNELIA O'CONNOR GREY, JAMES CHARLES GREY, AND MICHAEL CARTER GREY,

Petitioners,

v.

FIRST NATIONAL BANK IN DALLAS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR FIRST NATIONAL BANK IN DALLAS IN OPPOSITION

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OPINIONS BELOW

The District Court filed no opinion. The opinion of the Court of Appeals for the Fifth Circuit (App. A of Petition) is reported at 393 F.2d 371.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 21, 1968. A petition for re-

hearing was denied on June 14, 1968. The petition for writ of certiorari was filed on September 12, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that the District Court's instructions to the jury did not have the effect of directing a verdict on the issues of fraud and damages.

2. Whether the Court of Appeals correctly held that the District Court's charge submitted the issue of non-disclosure to the jury.

3. Whether the Court of Appeals properly upheld the District Court's action when, during the jury's deliberations at the end of a three week's trial that had produced a transcript of over 2,000 pages and 400 exhibits, the jury inquired if there was "any testimony to indicate" a certain fact, and petitioners requested an instruction "that there was no such testimony in the record" and that the fact was "undisputed," which request the Court refused and instead instructed the jury that it was "the exclusive judge of the evidence."

4. Whether the petitioners may now raise the question of the alleged "bias and prejudice" of the District Judge which they failed to specify as error and present to the Court of Appeals.

5. Whether the findings of the District Court and the Court of Appeals that the evidence was sufficient to support the jury verdict on Kelton's authority are correct.

CONSTITUTIONAL AND PROCEDURAL PROVISIONS INVOLVED

The pertinent Constitutional provision (U. S. CONST. amend. XIV, §1) and procedural provisions (FED. R. CIV. P. 7, 8, 15 and 49) are set forth in the Petition at pp. 5-6.

STATEMENT

1. *Nature of the Case*

Petitioners, Mrs. Cornelia O'Connor Grey ("Mrs. Grey"), James Charles Grey ("James") and Michael Carter Grey ("Michael"), seek review of the unanimous decision of the Court of Appeals affirming the judgment of the District Court which exonerated the First National Bank in Dallas ("Bank")[1] from all alleged wrongdoing.

The suit is based upon an alleged breach of trust by Bank while serving in a fiduciary capacity as trustee and agent for petitioners. Alleging fraudulent representation and concealment of material facts by the Bank, the petitioners sought rescission of a Partition and Sale Agreement ("Agree-

[1] The Greys (petitioners here) sued the Bank not only in its private corporate capacity, but also in its capacity as the Successor Trustee of the testamentary trust of James Charles O'Connor ("O'Connor Trust") and as Successor Trustee of the charitable testamentary trust of Ivor Elizabeth O'Connor Morgan ("Morgan Trust"). Other parties included the Attorney General of the State of Texas ("Attorney General") who, by virtue of Article 4412a, TEX. REV. CIV. STAT. ANN. (1959), is a necessary party in any suit to "nullify or impair the provisions of any instrument . . . affecting a charitable trust."

ment") (I R. 106)[2] under the terms of which they agreed to a partition of several tracts of property and to the purchase by the Bank for $1,155,000 of one of the tracts, the A'Mell Building. The A'Mell Building, together with other property in an entire city block, Block 60, was to be and has been used by the Bank as the site for its new banking house and fifty-two story office building. The suit also sought to avoid the effect of a final State Court judgment (I R. 124) which confirmed and approved the transaction complained of by petitioners, relieved the Bank, as trustee, from all self-dealing and other restrictions that would otherwise have prohibited the transaction contemplated, and authorized all parties to consummate the partition and sale.

2. *The Partition and Sale*

The record reveals that as soon as the Bank decided to attempt acquisition of Block 60 for its new quarters, it communicated its desire to the beneficiaries (petitioners here) and offered to resign as trustee (II R. 765-68, 851-52; P-22, V R. 69; D-8, VII R. 589). Following rejection of its offer to resign, the Bank proceeded to furnish the petitioners with relevant information to assist them in determining a price

[2] The record in the Court of Appeals which was certified to this Court will be cited "R" preceded by the number of the printed volume. Plaintiffs' exhibits cited herein will be designated by the letter "P" followed by the specific exhibit number and a citation to the volume and page of the printed record where that exhibit appears, such as P-22, V R. 69. Defendant Bank's exhibits will be designated by the letter "D," and the O'Connor Trust's exhibits will be designated by "O'Connor," followed by their number and volume citation.

The transcript of the State Court proceedings marked in the District Court as Defendant's Exhibit 127 which was part of the record in the Court of Appeals, but not printed, will be cited "Record on Appeal, D-127" followed by the page reference.

to ask for the subject property (II R. 993-94; III R. 1168-69, 1172; P-23, V R. 71; D-12, VII R. 592; D-13, VII R. 593; D-125, VII R. 823).

The Bank's disclosure of its interest in acquiring the property was made in April, 1960. At that time Mrs. Grey and her counsel were agreeable in principle to the Bank's acquiring the property provided the price could be agreed on and provided the property could be partitioned to the charitable Morgan Trust so that the sale would be made by that trust to the Bank (III R. 1163-65). Mrs. Grey was not, however, unfamiliar with the value of the A'Mell Building. Prior to its concern with Block 60 as a new building site, Bank had, in October 1959, furnished Mrs. Grey with the 1959 Dallas Real Estate Board appraisals of the eight properties she held jointly with the O'Connor and Morgan Trusts (P-237, VI R. 547). She had agreed to have such appraisals made in connection with a pending voluntary partition of the properties between her, the O'Connor Trust and the Morgan Trust. One of these, the A'Mell Building, was appraised at $500,000 (P-236, VI R. 545-46).

The petitioners did not, however, depend on Bank alone for information. They were advised by their attorney, Mr. Leo P. Dorsey of the New York bar, who had "considerable experience in real estate" (III R. 1139), and also they had assistance from their accountants Messrs. Wendell and Dreher, and various other "financial advisors" (P-231, VI R. 532; D-144, VII R. 868; D-145, VII R. 870). Among them was Mr. Robert R. Ferguson, Vice President and Trust Officer of the Republic National Bank of Dallas, a competitor of the Bank, which planned to succeed it in the management

of Mrs. Grey's agency account (P-231, VI R. 532; D-144, VII R. 868).

After almost five months' consideration, and after rejecting a second offer of the Bank to resign as trustee of both trusts (III R. 1169, 1264), petitioners submitted to the Bank on September 14, 1960 their price of $1,155,000. The Bank promptly agreed to pay such price, although it was more than twice the Dallas Real Estate Board appraisal (III R. 1022). In determining the price to ask for the property, the petitioners by their own declaration had the Bank "over the barrel" (III R. 1181; D-141, VII R. 864). To afford the petitioners certain income tax advantages, it was also agreed that the purchase of the A'Mell Building would be made from the charitable Morgan Trust after the partition.

Promptly after the execution of the Agreement, the Attorney General of the State of Texas was furnished a copy and was informed of the proposed transaction (P-268, VII R. 576). He conducted a completely independent investigation of the matter (III R. 1474-81). Pursuant to the provisions of the Agreement, suit was filed in the State District Court seeking approval of the transaction. The petitioners as well as the Attorney General were named parties to that suit. After a day's hearing at which the testimony of a number of witnesses, including two independent realtors on value, was presented, the court approved and confirmed the Agreement (Record on Appeal, D-127). Not until the conclusion of the evidence in that hearing did the Attorney General give his consent to the transaction. As

to the Attorney General's position in the State Court hearing, Assistant Attorney General Ben H. Harrison, Esquire, testified:

> "I stood up and said that it was the Atorney General's opinion that it was a fair and just partition as far as the charitable trust was concerned, and thought the consideration was adequate for the charitable interest, and therefore, joined in the petition of the Bank to approve the partition agreement, and asked leave of the court to file this proceeding, and the court granted leave . . ." (III R. 1481).

Pleadings by the Attorney General consenting to the transaction were thus filed in the case only after all evidence was in (III R. 1491).

Contrary to the petitioners' characterization of the State Court proceedings as a "mock hearing" (I R. 83), the State trial judge expressed his opinion at the conclusion of the trial as follows:

> "It occurs to me that there has been a more than fair disclosure. It has been a very well and thoroughly developed case" (Record on Appeal, D-127: p. 82).

Although the Attorney General has been a party to the present suit since it was filed in the District Court (III R. 1485) and had the benefit of all the so-called "discovery of fraud" unearthed by petitioners in discovery proceedings, he did not lend his support to the petitioners in their efforts to obtain rescission or damages.

3. *Proceedings Below*

The final test of fairness came in the District Court below when, after three weeks of trial, the court and a jury

both approved the Agreement and the procedures consummating it.

In its charge the District Court instructed the jury that the Agreement was conditioned upon its approval by the State Court in a proceeding in which the petitioners and Attorney General were parties (I R. 290); that the petitioners contended "the Bank as Agent and Trustee violated its fiduciary duties in the negotiations leading to the agreement and to the State Court Judgment" in that the Bank "made certain material representations which were false and concealed certain material facts" and petitioners "ask for money damages" (I R. 291); and that, "As to the State Court case, it was the contention of James C. Grey and Michael C. Grey that they did not authorize the employment of Philip Kelton to represent them in said case" (I R. 291).

The independence of the fraud issues from the issue relating to Kelton's authority is manifest by the District Court's instruction to the jury that:

> "The issues in this case for your decision are: (1) *Whether the First National Bank in its individual capacity misrepresented or concealed material facts which were relied on to the damage of Plaintiffs* (2) whether the partition and sale agreement was later ratified by Mrs. Grey, Michael or James Grey with full knowledge of the facts and their legal rights (3) *whether Mr. Kelton was authorized to represent James and Michael Grey in the State Court case,* and (4) whether James and Michael Grey consented to the entry of judg-

ment in the State Court" (I R. 292). (Emphasis added.)[3]

It was in light of the foregoing instructions that the Court of Appeals in considering petitioners' claim "that the court's instruction that Mrs. Grey was bound by the state court judgment and that James and Michael were likewise bound unless the jury found that they had not authorized Kelton

[3] Accordingly, the first three issues the District Court submitted to the jury were (I R. 297-98):

"Special Issue No. 1

"Do you find by a preponderance of the evidence that Philip Kelton did not have authority to represent James C. Grey or Michael C. Grey in the case of First National Bank against Cornelia O'Connor Grey et al, in the 116th Judicial District Court, Dallas County, Texas?

"Answer as to each party, 'He was not authorized' or 'He was authorized.'

James C. Grey	He was Authorized
Michael C. Grey	He was Authorized

"Special Issue No. 2

"Do you find from a preponderance of the evidence that the First National Bank in furnishing information to Mrs. Grey, James Grey, and Michael Grey leading to the partition and sale agreement of September 19, 1960 and the judgment of the State Court of November 28, 1960 made any material misrepresentations?

"Answer 'yes' or 'no' as to each party.

Mrs. Grey	No
James C. Grey	No
Michael C. Grey	No

"Special Issue No. 3

"Do you find from a preponderance of the evidence that the First National Bank in the negotiations with Mrs. Grey, James Grey, and Michael Grey leading to partition and sale agreement of September 19, 1960 and the judgment of the State Court of November 28, 1960 concealed any material facts?

"Answer 'yes' or 'no' as to each party.

Mrs. Grey	No
James C. Grey	No
Michael C. Grey	No

The issues relating to fraud, Special Issues Nos. 2 and 3, are completely independent and in no way conditioned upon an affirmative finding to Special Issue No. 1 that Kelton "was authorized."

to represent them was tantamount to instructing a verdict for First National on the issues of fraud and damage" (App. 16a, 393 F.2d at 382), concluded that:

> "The court's charge, taken as a whole, shows that the issue of the state court's jurisdiction was completely separate from the issue of whether First National fraudulently obtained that judgment. The distinction is also clear from the special interrogatories: Special Issue No. 1 went to Kelton's authority; Special Issues Nos. 2 and 3 to the alleged concealment or misrepresention. We therefore see no basis for appellants' contention that the jury might have believed that if it answered 'yes' as to Kelton's authority, it was bound to answer 'no' as to fraud" (App. 16a, 393 F.2d at 382).

Petitioners also contended below that the District Court failed to submit an issue to the jury on the Bank's alleged failure to disclose. Viewing the District Court's charge that advised the jury of the Bank's position as a fiduciary with respect to petitioners (I R. 290), and that the Bank therefore had "a duty to impart . . . all material facts in dealings" with petitioners (I R. 294-95), and that the petitioners contended Bank had "violated its fiduciary duties" (I R. 291), although the Bank "denies that it misrepresented or concealed any material facts, contending . . . it made a full disclosure of all material facts" (I R. 291), the Court of Appeals was constrained to hold that:

> "Considered as a whole, we find that the court did charge the jury that an issue was First National's failure to disclose" (App. 14a, 393 F.2d at 381).

Shortly after the jury began its deliberations, the jury sent the following inquiry to the District Court:

> "Was their [sic] any testimony to indicate whether the bank told Mrs. Grey or her attorney that Mr. Majors owed the First National Bank $650,000.00 on The Republic Garage Building" (I R. 362-63).

Thereupon, petitioners' counsel below requested the District Court to instruct the jury that there was "no such testimony in the record" and that it was "undisputed" that the Bank had not advised Mrs. Grey or Mr. Dorsey of the Majors' loan (I R. 363). The District Court, in response to the question, advised the jury that it was "the exclusive judge of the evidence" (I R. 364).

The problems inherent in the response by the District Court to the jury's inquiry were appreciated by the Court of Appeals:

> "In order to answer the question on the merits, the judge would have had to review over 2,000 pages of transcript and 400 exhibits and, in the absence of direct testimony, draw an inference as to the proper answer. This would have been an insurmountable burden. As an alternative, the judge could simply have tried to recall the evidence and evaluate its significance, but in so doing she would have been acting as a 13th juror" (App. 24a. 393 F.2d at 386).

Accordingly, the District Court's answer was "an appropriate one" (App. 24a, 393 F.2d at 386).

The verdict of the jury that Kelton was authorized to represent James and Michael in the State Court proceeding is supported by abundant evidence: Paragraph 5.06 of the

Agreement (I R. 117) obligated the Bank, as trustee of the O'Connor Trust, to "retain such counsel to represent it in such proceeding as is recommended by Mrs. Grey and the Remaindermen, and to file such answer in such proceeding as is recommended by such counsel . . . ." The petitioners, therefore, had the contractual right to select counsel for the O'Connor Trust. They were afforded such right of selection. Mr. Dorsey testified:

> "Again, the bank told us that we could obtain any counsel that we wanted to, but our position was that we did not want to pick out any counsel, we wanted this deal to go through, and therefore, any counsel that the bank picked out would be satisfactory to Mrs. Grey and to the two boys" (III R. 1188).

The Agreement was signed by Mrs. Grey and James in New York on September 19, 1960. Mrs. Grey was to take a counterpart of the Agreement with her to Paris, France, and obtain the signature of Michael. However, as late as October 10, 1960, the Bank had not received the counterpart of the Agreement signed by Michael and the petitioners had not suggested nor approved any attorney to represent the O'Connor Trust in the forthcoming State Court proceeding. Neither had the petitioners chosen an attorney to represent themselves individually.[4] Time was running out.

[4] The Agreement obligated Mrs. Grey promptly to file an answer in the State Court proceeding asking that the Agreement be approved and confirmed and that the relief sought by the Bank be granted (I R. 116). It also required Mrs. Grey to recommend to James and Michael that they file a similar answer in the proceeding. James and Michael each approved, ratified and adopted the Agreement "with the same force and effect as if he were a party thereto" (I R. 123-24). All parties had agreed to "cooperate in consummating this agreement in the most expeditious manner practicable" (I R. 118).

The contract required that the transaction contemplated be completed by December 31, 1960. Bank's counsel, on October 10, 1960, wrote Mr. Dorsey a letter suggesting that "if it is agreeable to you and Mrs. Grey" it would seem that Mr. Kelton, in view of his firm's previous representation of the trust, "would be an appropriate person to represent the O'Connor Trust in the court proceeding" (P-90, V R. 241). Mr. Dorsey responded to Bank's counsel's letter on October 13, 1960 (D-21, VII R. 612) stating:

> "I am sure that Mr. Phil Kelton of the firm of Strasburger, Price, Kelton, Miller & Martin, Esqs. is agreeable to Mrs. Grey, as well as myself, to represent the O'Connor Trust in the proceeding."

Mr. Kelton then called Mr. Dorsey on the telephone and inquirred "if he were authorized to represent Mrs. Grey and the two boys" (III R. 1190). Mr. Dorsey's reply was "yes, unquestionably" (III R. 1190). Thereafter, Mr. Dorsey, by letter dated November 9, 1960, advised Mrs. Grey:

> "Since Mr. Kelton had represented the O'Connor Trust previously, I authorized him to represent the O'Connor Trust and yourself and James and Michael in the A'Mell Building petition matter" (O'Connor-1, VIII R. 1135).

The petitioners were a "very closely knit" family and when separated corresponded with one another frequently (II R. 562; III R. 1285). They were all together in Paris, France, when Mrs. Grey received Mr. Dorsey's letter of November 9, 1960, informing her that he had employed Mr. Kelton to represent her, James and Michael in the State Court proceeding and had also approved Mr. Kelton's representation of the O'Connor Trust in that proceeding

(II R. 564, 583). That Mrs. Grey had the authority from her sons to do whatever was necessary to consummate the Agreement is made clear by her testimony in the District Court.[5] Michael admitted that he never disagreed with his mother about "handling of the Dallas property" (II R. 575).[6] In view of their arrangement it is understandable that when Mrs. Grey presented the Agreement to Michael to sign they discussed it but he didn't have any questions about it. He just said "Where do I sign" (III R. 1285). Mrs. Grey had recommended to Michael that he file an answer in the State Court proceeding and he had agreed to do whatever she wanted (II R. 585-88). Michael also admitted that his

[5] Mrs. Grey testified:

"Q. They [boys] loved you dearly, didn't they?

"A. Yes.

"Q. And anything you wanted, that is what they wanted, wasn't it?

"A. Just about, yes.

"Q. And they really left things to you, you had to do it, didn't you?

"A. Yes" (III R. 1389).

Mrs. Grey also testified:

"Q. Did they [boys] leave all of the management and the handling of these properties to you, Mrs. Grey?

"A. Well, I would say that as little as they knew they practically had to.

"Q. Well, did they, in fact?

"A. In fact, yes.

"Q. And it is true that whatever was done with respect to the Dallas properties was by and through you?

"A. That's right" (III R. 1296).

[6] Michael testified:

"Q. Is it true, sir, that from the beginning of time you had never disagreed with your mother about the handling of the Dallas property?

"A. I never argued with her about it. She never talked much about it — I never talked with her much about it.

"Q. Have you ever disagreed with her, sir?

"A. Not to my recollection" (II R. 575).

mother had told him that Mr. Dorsey was representing "the family interests" (II R. 570). It was shown Michael testified in his deposition, with respect to Mr. Dorsey, that "I knew he was taking care of our case" (II R. 571). It was also shown that Michael, in his deposition, had testified (II R. 572):

> " 'ANSWER: Yes, I believed Dorsey was handling the family interests, my brother's and mine and mother's at the same time.'
>
> "Q. Didn't you so testify?
>
> "A. I did so testify."

The evidence with respect to James on the question of Mr. Kelton's authority to represent him in the State Court is even more overwhelming. James was personally present and participated in the September 1960 week of negotiations in Dallas, leading up to the execution of the Agreement. Mr. Dorsey purported to speak for the family (III R. 1168, 1170, 1181, 1184-85; III R. 1322). James never denied this authority.

On the return trip from Dallas to New York, Mr. Dorsey went over the Agreement with Mrs. Grey and then took a seat beside James and reviewed the Agreement with him including a discussion of the prospective State Court action (III R. 1232-35). Prior to Mrs. Grey's return to Paris, and in the presence of James, she directed Mr. Dorsey to send all correspondence to her concerning the A'Mell Building transaction and "she would take it up with the boys" (III R. 1198). There was no objection from James. It was shown that James testified in his deposition that, "I thought because he [Mr. Dorsey] represented my mother he repre-

sented me, because we were all of the same family" (IV R. 1753-54).

James and Michael each acknowledged that Mr. Dorsey was their attorney on the McClanahan Trust matter which dated back to 1956 and continued until February 1961 (II R. 518; III R. 1457; IV R. 1715). During the summer of 1960, Mr. Dorsey represented them in connection with investigating the abandonment by a trustee of some Florida lands (III R. 1137-38). Mr. Dorsey also represented Mrs. Grey and James (and perhaps Michael) concerning a trust intended to give James (and perhaps Michael) certain income (III R. 1138; IV R. 1709).

A review of the entire record demonstrates that Mr. Dorsey was the "family counselor."

ARGUMENT

I

THE DISTRICT COURT'S INSTRUCTION AS TO THE EFFECT OF THE STATE COURT JUDGMENT DID NOT DIRECT THE JURY TO FIND IN FAVOR OF THE BANK ON FRAUD AND DAMAGE ISSUES, AND THE COURT OF APPEALS' HOLDING TO THAT EFFECT IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN *CALLEN v. PENNSYLVANIA R.R.*, 322 U.S. 625 (1948)

Petitioners contend that the District Court's instruction that Mrs. Grey was "bound" by the State Court judgment and that James and Michael were likewise "bound" unless the jury found Kelton lacked authority to act for them in

that suit,[7] was tantamount to instructing a verdict in Bank's favor on all fraud and damage issues.[8] The Court below rejected this argument holding that the charge, taken as a whole, shows that the issue of the State Court's jurisdiction was completely separate from the issue of whether Bank fraudulently obtained that judgment (App. 16a, 393 F.2d at 382). On the facts of the present case (see "Statement," *supra* at 8-10) the decision of the Court of Appeals was manifestly correct.

---

[7] The instruction complained of reads as follows:

> "Insofar as the State Court case is concerned Mrs. Grey, individually, and as a beneficiary of the O'Connor Trust, the Morgan Trust, and the Attorney General are bound by the Judgment approving the partition and sale of the properties here concerned. If you find by a preponderance of the evidence that Philip Kelton did not have authority to act for James C. or Michael C. Grey, they will not be bound by the State Court Judgment, and the partition and sale will not be effective as to them as Remaindermen of the O'Connor Trust, unless the entry of judgment was consented to by them or the partition and sale agreement was later ratified by them" (I R. 292).

[8] Framed as a direct attack, petitioners' first count of their complaint (I R. 4) seeks to avoid the *res judicata* effect of the final State Court judgment by alleging fraud in its procurement. However, under settled Texas law a prior judgment can be set aside only if the fraud alleged and proved is of an "extrinsic" nature. Alexander v. Hagedorn, 148 Tex. 565, 226 S.W.2d 996 (1950); Bankston v. Bankston, 251 S.W.2d 768 (Tex. Civ. App. 1952, mandamus overruled).

The issues raised in petitioners' first count are essentially the same as those determined by the State Court some years earlier. By motion to dismiss filed in the District Court and by counterpoint in the Court of Appeals, the Bank questioned the petitioners' right to relitigate the same facts under the guise of a direct attack. Its position was then, and is now, that the allegations did not constitute extrinsic fraud, but only matters intrinsic to the former proceeding and hence was an attempt to retry the earlier case. The Court of Appeals failed to reach this issue "since the jury found that the state court judgment was not procured by fraud" (App. 12a n.8; 393 F.2d at 380 n.8).

Petitioners also assert that the holding of the Court of Appeals on this point is in conflict with this Court's decision in *Callen v. Pennsylvania R.R.*, 332 U.S. 625 (1948). The case under consideration is distinguishable on its facts and there is no conflict with *Callen*.

In *Callen*, the plaintiff, a railroad brakeman, brought an action under the Federal Employers Liability Act to recover for alleged permanent injuries received in the course of his employment. The defendant railroad denied negligence and pleaded a general release. It was undisputed that for a consideration of $250 the plaintiff executed a general release. However, the validity of this release was drawn into question and was litigated on grounds of mutual mistake as to the extent of the plaintiff's injury. Nevertheless, in instructing the jury, the trial court stated (332 U.S. at 627-28):

> "Anyhow, they settled to the extent of $250.00, and the release has been offered in evidence and admitted, and *both sides agree that that release was not in contemplation of any sort of permanent injury.*
>
> * * *
>
> "The release, as I have told the attorneys for both sides, I do not consider binding insofar as it applies to his permanent injuries, *because the Pennsylvania Railroad certainly didn't know he was permanently injured* ..." (Emphasis added.)

It was in light of the foregoing instructions that this Court affirmed the lower court holding that "The Circuit Court

of Appeals quite rightly . . . construed the charge of the District Judge as withdrawing the question of validity of the release from the jury" (332 U.S. at 628).*

The particular set of facts here presented differs from those in *Callen* and the holding of the Court below does not conflict with this Court's decision in that case.

II

THE HOLDING OF THE COURT BELOW THAT THE DISTRICT COURT'S CHARGE PROPERLY SUBMITTED ALL OF PETITIONERS' CLAIMS TO THE JURY IS MANIFESTLY CORRECT AND IS NOT IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL

Petitioners contend that the District Court's charge to the jury failed to submit the issue of nondisclosure separately from the issues of misrepresentation and concealment. As shown in the "Statement," *supra* at 10, the District Court's charge, considered as a whole, did submit the question of the Bank's alleged failure to disclose to the jury.

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* Moreover, it was "apparent that the jury accepted the instructions of the court on the subject of the release," 332 U.S. at 629, because, in light of the court's instruction,

> "Now, I am going to consider that release as binding to the amount of $250.00, and if you find a verdict for the plaintiff you will deduct that from any amount you would otherwise give him" (332 U.S. at 627-28),

the jury returned and rendered a verdict: "For the plaintiff, and assess[ed] the damages at $25,240, of which the railroad is to be reimbursed with $250.00" (322 U.S. at 629).

Furthermore, it did so in keeping with the language used by petitioners in their pleadings. As the Court below aptly noted:

> "Moreover, in examining the record we find that appellants themselves were not always conscious of a difference between misrepresentation and concealment, on the one hand, and failure to disclose, on the other. Thus in Paragraph 19 of their complaint they stated, 'Bank was under a *duty to disclose* to plaintiffs each and all of the facts alleged in paragraph 18 hereof, and by *concealing the same* . . .' (emphasis added). The same phraseology is utilized in Paragraphs 22 and 56, and if appellants may use the terms interchangeably, they should not be heard to complain if the court does also" (App. 15a; 393 F. 2d at 381-83).[10]

Under Texas law, "It is recognized that silence, where the party is under a duty to speak, may amount to a concealment." *Alco Oil & Gas Corp. v. Concord Oil Co.*, 375 S.W.2d 463, 466 (Tex. Civ. App. 1964), *aff'd*, 387 S.W.2d 635 (1965). To the same effect are *Chandler v. Butler*, 284 S.W.2d 388, 395 (Tex. Civ. App. 1955, no writ); *Phillips Petroleum Co. v. Daniel Motor Co.*, 149 S.W.2d 979, 988 (Tex. Civ. App. 1941, writ dism'd, judgm't cor.).

Petitioners also assert that the decision in the instant case is in conflict with the decisions of the Seventh Circuit in *Tilman v. Great American Indem. Co.*[11] and in *Mickey v.*

[10] The examples cited by the Court below are not isolated ones. See for example Paragraph 29 (I R. 54); Paragraph 57 (I R. 69); Paragraph 59(a), (b), (c), (d), (e), (f), (h), (j) (I R. 70-78); Paragraphs 60 and 61 (I R. 78); Paragraph 62 (I R. 79); Paragraph 64 (I R. 80), Paragraph 93 (I R. 92); Paragraph 112 (I R. 100).

[11] 207 F.2d 588 (7th Cir. 1953).

Tremco Mfg. Co.[12] and with the decision of the Ninth Circuit in *Palmiero v. Spada Distrib. Co.*,[13] holding that all issues raised by the pleadings should be submitted to the jury. The District Court below did submit all petitioners' theories of recovery and did so in the same language used by petitioners. There is no conflict of decision.

III

THE SUPPLEMENTAL INSTRUCTION REQUESTED BY PETITIONERS WOULD HAVE CONSTITUTED A COMMENT ON THE EVIDENCE AND WAS PROPERLY REFUSED

When the jury asked the District Court if there was any testimony to indicate whether the Bank had told Mrs. Grey or her attorney about the existence of a loan to Mr. Majors, petitioners requested the Court to advise the jury "that there was no such testimony in the record" and that it was "undisputed" that the Bank did not tell Mrs. Grey or her attorney of the loan's existence. The requested instruction, if given, would have constituted a comment upon the evidence. Furthermore, it would have conflicted with the stipulation that the Bank had told Mrs. Grey's attorney about the loan on August 21, 1961 (Stipulation, VII R. 1152).[14]

[12] 226 F.2d 956 (7th Cir. 1955).

[13] 217 F.2d 561 (9th Cir. 1954).

[14] The jury's note does not inquire as of a certain date. When Mrs. Grey's New York counsel, Leon Alexandroff and Neil A. Pollio, came to Dallas in August 1961 to investigate Mr. Dorsey's representation of Mrs. Grey, voluminous documents were furnished them by the Bank. These items included Majors' loan application (P-110, V R. 278), Majors' liability ledger (P-127, P-127(a), VI R. 40-41) and Majors' collateral ledger (P-127(c), VI R. 343).

Petitioners also assert that the pleadings furnish a basis for the District Court to have instructed the jury as requested since Bank "admitted" in its Answer "that it had not made disclosure to Mrs. Grey or her attorney of Majors' indebtedness to it secured by the Republic Garage Building" (Petition, p. 15). Examination of the pleadings will not, however, support that position. Paragraph 55(a) of the Complaint (I R. 65), cited by Petitioners in support of their request (I R. 363), refers to the acquisition by Z. L. Majors, Trustee, of the A'Mell Building, and **not the Republic Garage Building** that the jury inquired about. The Bank answered this allegation by stating it was "without knowledge or information sufficient to admit or deny" (I R. 187).

On the basis of the foregoing the Court's reply was proper.

Petitioners also claim a conflict in decision between the Court below and the holding of the Seventh Circuit in the criminal case of *United States v. Jackson*, 257 F.2d 41 (7th Cir. 1958).[15] In *Jackson*, the jury, during its deliberation, asked the court if a certain witness was a government employee. The trial judge "said that he did not remember" and "the jury, therefore, was sent back to resume its deliberations without any answer to its question," 257 F.2d 42. Thereupon, counsel for the accused requested "that those parts of the transcript dealing with this question be read to the

[15] We also note that the two cases cited by petitioners as following *Jackson*, United States v. Fiorito, 300 F.2d 424 (7th Cir. 1962) and Gregory v. United States, 365 F.2d 203 (8th Cir. 1966), were likewise criminal cases.

jury," 257 F.2d 43. The trial court failed to honor the request. The Court of Appeals reversed the defendant's conviction, holding that:

> "In view of the circumstances present in this case, we think that the failure to permit the reading of the relevant testimony at a time when it would have been useful in the jury's deliberations created unfairness to the defendant" (257 F.2d at 43).

Petitioners, however, made no request that any testimony be read to the jury. The *Jackson* case is therefore not in point. Furthermore, as stated by the Court below, the failure of petitioners' counsel to request the Court to instruct the jury concerning the reading of testimony precludes consideration of that point:

> "Appellants argue that at least the trial judge should have instructed the jury that it had a right to request any portion of the testimony to be read to it in open court by a court reporter. *We need not now consider this objection since appellants did not request such an instruction below*" (App. 24a; 393 F.2d at 386). (Emphasis added.)

IV

SINCE PETITIONERS DID NOT SPECIFY AS ERROR IN THE COURT BELOW THE ALLEGED "BIAS AND PREJUDICE" OF THE DISTRICT JUDGE, PETITIONERS ARE PRECLUDED FROM RAISING THE POINT FOR THE FIRST TIME BEFORE THIS COURT

Petitioners' "Specifications of Error" (Appellants' Brief, pp. 30-32) in the Court of Appeals makes no mention of

the alleged "bias and prejudice" on the part of the District Judge. Since this point was not assigned as error on the appeal to the Court of Appeals and was not presented and passed on there, it cannot be raised for the first time before this Court. *Lawn v. United States*, 355 U.S. 339, 362 n.16 (1958); *Husty v. United States*, 282 U.S. 694, 701-02 (1931); *Duignan v. United States*, 274 U.S. 195, 200 (1927).

Furthermore, petitioners failed to file a "timely and sufficient affidavit" that the District Judge had "a personal bias or prejudice" against them as required by 28 U.S.C. §144. The remarks of the District Judge, carefully selected for quotation by the petitioners, took place at a Pre-Trial Conference held some nine months prior to trial.

Even if considered on the merits, the remarks of the District Judge do not reflect a "predetermination of crucial issues" as petitioners allege (Petition, p. 28). Taken in context they show a respectful attempt on the part of the District Judge at a "simplification of the issues" as authorized by Rule 16 of the Federal Rules of Civil Procedure (see IV R. 1808-18).

V

THE FINDING OF THE JURY THAT KELTON WAS AUTHORIZED TO REPRESENT JAMES AND MICHAEL IN THE STATE COURT IS SUFFICIENTLY SUPPORTED BY THE EVIDENCE

Review is also sought by petitioners of the jury's verdict that attorney Kelton had authority to represent James and Michael in the State Court.[16] The correctness of the jury's finding turns solely upon an analysis of the particular facts involved (see "Statement," *supra* at 11-16). The District Court found sufficient evidence to support the jury's finding when it overruled (I R. 381) petitioners' motion for judgment *non obstanto verdicto* (I R. 368). The Court of Appeals affirmed (App. 17a-21a; 393 F.2d at 383-85). It has not been the practice of this Court to grant a certiorari to review evidence and discuss specific facts. *United States v. Johnston*, 268 U.S. 220, 227 (1925). No important question of Federal law is here present.

[16] Petitioners also make the claim here, but not assigned as error in the Courts below, that Kelton was disqualified from representing the O'Connor Trust and its beneficiaries (petitioners here) in the State Court proceeding because of the inherent "conflicting interests" (Petition, pp. 32-33). Petitioners overlook the fact that Mrs. Grey (and in all probability James and Michael) were made aware of this so-called "conflict" and raised no objection. By letter dated November 9, 1960, Mr. Dorsey advised Mrs. Grey:

> "Since Mr. Kelton had represented the O'Connor Trust previously, I authorized him to represent the O'Connor Trust and yourself and James and Michael in the A'Mell Building petition matter" (O'Connor-1, VIII R. 1135).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

United States Code

Title 28, Section 144:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Texas Revised Civil Statutes

Article 4412a, Section 2:

> For and on behalf of the interests of the general public of this state in such matters, the Attorney General shall be a necessary party to and shall be served with process, as hereinafter provided, in any suit or judicial proceeding, the object of which is:
>
> a. To terminate a charitable trust or to distribute its assets to other than charitable donees, or
>
> b. To depart from the objects of a charitable trust as the same are set forth in the instrument creating the trust, including any proceedings for the application of the doctrine of cy pres, or

c. To construe, nullify or impair the provisions of any instrument, testamentary or otherwise, creating or affecting a charitable trust, or

d. To contest or set aside the probate of an alleged will by the terms of which any money, property or other thing of value is given, devised or bequeathed for charitable purposes.